No. 90-1488

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

SUE SUTER, *et al.*,

Petitioners,

v.

ARTIST M., *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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MOTION OF RESPONDENTS FOR LEAVE TO FILE A SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT AND SUPPLEMENTAL BRIEF

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT

Plaintiffs, Artist M., *et al.*, through their attorney and next friend, Patrick T. Murphy, respectfully move this Court, pursuant to Supreme Court Rule 25.5, for leave to file a supplemental brief regarding the entry of a consent decree in a related case, *B.H. v. Suter*, No. 88 C 5599 (N.D. Ill.), which may bear on the Court's jurisdiction over this case. In support of their motion, plaintiffs state as follows:

1. Plaintiffs brought this case against the Director of the Illinois Department of Children and Family Services

(DCFS) under 42 U.S.C. § 1983, the Fourteenth Amendment, and the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620-628, 670-679a (the AACWA).

2. On December 2, 1991, the Court heard oral argument in this case regarding the enforceability of the AACWA's requirement that participating States make reasonable efforts to prevent the need for removing children from their families and reasonable efforts to make it possible for foster children to return to their families. 42 U.S.C. § 671(a)(15).

3. Later that month, on December 20, 1991, the United States District Court for the Northern District of Illinois entered a consent decree in *B.H. v. Suter*.

4. The plaintiff class in *B.H.* includes all of the children in Class B in this case. Like the plaintiffs here, the *B.H.* plaintiffs raised numerous claims against DCFS's Director under the AACWA, including claims based on the reasonable efforts requirement.

5. The consent decree contains a judicially enforceable agreement by DCFS to make reasonable efforts to keep children with their families and to return foster children to their families. It also constituted a final resolution of plaintiffs' claims in that case.

6. As plaintiffs explain more fully in their supplemental brief, the *B.H.* consent decree arguably renders the claims of some of the plaintiffs here moot. As a result, it may have an effect on the Court's jurisdiction over this case. Additionally, a number of the provisions of the consent decree support plaintiffs' position on the merits in this case.

7. The parties have a " 'continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation." *Board of License Commissioners of the Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985), *quoting Fusari v. Steinberg*, 419 U.S.

379, 391 (Burger, C.J., concurring). Thus, plaintiffs seek to inform the Court of the effect of *B.H.* through their supplemental brief.

8. In a January 10, 1992, letter to the Clerk of the Supreme Court, defendant contends that the *B.H.* consent decree, though entered by the District Court after oral argument in this case, does not constitute an "intervening matter" under Rule 25.5, because the District Court had tentatively approved a consent decree on August 29, 1991. Defendant suggests that plaintiffs or amici should have addressed any concerns regarding the "potential mootness" of this case at that time. Letter at 1.

9. Defendant, however, is mistaken in her understanding of the effects of a tentative consent decree. Even if preliminarily approved by the District Court, a *tentative* settlement agreement does not moot the parties' claims. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, n.3. *See also Washington v. Washington State Commercial Passenger Fishing Association*, 443 U.S. 658, 692 n.32 (1979) (possibility that subsequent events may render case moot does not prevent Court from addressing merits of case). Only upon its final approval can a consent decree have such effect. *See, e.g., J. Aron & Co. v. Mississippi Shipping Co.*, 361 U.S. 115 (1959). Similarly, a tentative settlement cannot moot claims in a related case.

10. That point is underscored by the role in *B.H.* of counsel for the *Artist M.* plaintiffs. Counsel for the plaintiffs in this case attempted unsuccessfully to intervene in *B.H.* because they did not believe that their clients' interests were being protected. Plaintiffs' counsel in this case also objected to the entry of the consent decree in *B.H.* at a hearing in November 1991.[1] Thus, any suggestion by plaintiffs regarding *B.H.*'s effects on this case would have

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[1] Plaintiffs' counsel in this case are also appealing the *B.H.* District Court's decision to enter the decree and its denial of their motion to intervene in that case.

been premature prior to its entry by the District Court in late December.

11. Finally, apart from whether the consent decree constitutes an "intervening matter" under Supreme Court Rule 25.5, plaintiffs remain obligated under *Pastore* to apprise this Court of the decree, given its possible effects on plaintiffs' claims and the Court's jurisdiction in this case.

WHEREFORE, plaintiffs respectfully request that this Court grant them leave to file a supplemental brief regarding the impact of the *B.H.* consent decree on this case.

Respectfully submitted,

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RESPONDENTS' SUPPLEMENTAL BRIEF AFTER ORAL ARGUMENT

On December 20, 1991, the United States District Court for the Northern District of Illinois entered a consent decree in *B.H. v. Suter*, No. 88 C 5599. Plaintiffs respectfully submit this brief, in accordance with Supreme Court Rule 25.5 and this Court's opinion in *Board of License Commissioners of the Town of Tiverton v. Pastore*, 469 U.S. 238, 240 (1985), to advise the Court of the impact of the *B.H.* consent decree on this case.

I. THE *B.H.* CONSENT DECREE [1]

B.H. v. Suter was brought on behalf of all children in the custody of the Illinois Department of Children and Family Services (DCFS), seeking injunctive and declaratory relief under 42 U.S.C. § 1983, to remedy DCFS's systemic failure to provide them with adequate care. The plaintiff class in *B.H.* consisted of "all persons who, on or after [June 29, 1988], are in the custody of [DCFS] and have been placed somewhere other than with their parents." Decree at 1-2. The defendant in *B.H.*, as in this case, is Sue Suter, the Director of DCFS.

The plaintiffs in *B.H.* presented claims against DCFS under both the Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 620-628, 670-679a (the AACWA), and the Fourteenth Amendment. Amended Complaint at ¶ 1, Second Amended Complaint at ¶ 1. In particular, the *B.H.* plaintiffs—like the plaintiffs here—alleged that DCFS had failed to comply with its obligations under the reasonable efforts requirement of the AACWA, 42 U.S.C. § 671(a)(15).[2] Amended Complaint at ¶ 30; Amendment

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[1] Amici curiae Illinois State Bar Association, *et al.*, and American Association for Protecting Children, *et al.*, submitted a copy of the *B.H.* consent decree to the Court on January 9, 1992. On January 10, 1992, plaintiffs requested that the Clerk of the Court distribute copies of the decree to the Justices.

[2] The AACWA provides, in relevant part:

> In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which . . . pro-

to Plaintiffs' Second Amended Complaint. The *B.H.* plaintiffs alleged that DCFS had failed to "[m]ake reasonable efforts to maximize the likelihood that plaintiffs can be safely returned to their homes," Amended Complaint at ¶ 30, and had failed to "provide appropriate care and services to help named plaintiffs and other members of the class return to their homes." *Id.* at ¶ 3. *See also id.* at ¶¶ 10-14, 21. After lengthy negotiations the parties entered into a consent decree, which, by its own terms, constitutes a "final resolution of all claims" set forth in the case. Decree at ¶ 79.

In the decree, DCFS has agreed to provide the "reasonable efforts" sought by the *B.H.* plaintiffs and by the plaintiffs in this case. Indeed, the consent decree requires DCFS to make reasonable efforts not only for children in DCFS's custody (*i.e.*, current plaintiff class members in *B.H.*), but also for children who continue to reside with their parents.

Paragraph 8 of the decree, for example, reaffirms DCFS's statutory obligation to make reasonable efforts to keep families together:

> 8. Reasonable Efforts To Prevent Placement. As of the date of the entry of this Order, DCFS shall not remove a child from a parent or continue the removal by another person authorized to take protective custody under state law . . . *unless DCFS has made reasonable efforts to prevent or eliminate the need for removal of the child.* "Reasonable efforts" as used in this paragraph and paragraph 7 means such efforts to preserve the family as are consistent with good social work practice based on the individual circumstances of the case and the best in-

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vides that, in each case, reasonable efforts will be made (A) prior to the placement of a child in foster care, to prevent or eliminate the need for removal of the child from his home, and (B) to make it possible for the child to return to his home. . . .

42 U.S.C. § 671(a)(15).

> terest of the child, and may include but are not limited to the offer and provision of appropriate family preservation services from among those listed at Ill. Rev. Stat. ch. 23, § 2058.2.

Decree at ¶ 8 (emphasis added). In addition, in paragraph 7 DCFS has agreed that beginning July 1, 1983, it will complete an assessment of each child's case prior to the first hearing in Juvenile Court, in order to identify the reasonable efforts that can be made to keep the family together. *Id.* at ¶ 7.

Likewise, the decree incorporates DCFS's obligation under § 671(a)(15) to make reasonable efforts to reunite foster children with their families. Paragraph 16(a) of the decree requires DCFS to fulfill this obligation by making adequate permanency plans for these children. *Id.* at ¶ 16(a). Finally, the defendant has agreed to a definition of reasonable efforts, which is tied to a standard of accepted social work practice. *Id.* at ¶¶ 8, 16(a).

The decree also implicitly and explicitly requires DCFS to remedy deficiencies in its caseworker assignment system. First, DCFS will be required to assign follow-up caseworkers before cases are brought to Juvenile Court, in order to complete the social assessment required by paragraph 7.[3] Second, the consent decree provides for improved continuity in caseworker assignment by eliminating the Interim Service Teams, Decree at ¶ 10, which, as the District Court found in this case, have been the source of countless gaps in caseworker assignment. *See, e.g.*, J.A. 43, ¶ 21; J.A. 47, ¶ 35. Third, the decree sets ceilings on the number of cases which will be handled by follow-up caseworkers who are assigned to

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[3] As the District Court found in this case, DCFS investigators have no role in arranging for the delivery of child welfare services. J.A. 34, ¶ 2. Thus, under DCFS's system, follow-up caseworkers alone will be capable of developing the social assessments described in the decree. *Cf.* J.A. 36, ¶ 6.

provide services to intact families and to children in DCFS's custody. Decree at ¶ 28. Finally, under *B.H.* DCFS has agreed to ensure that each child has "a case-worker or case manager with the training, competence and authority to carry out Department polffiicies." *Id.* at ¶ 26.

The decree sets forth several monitoring and implementation provisions. *See, e.g., id.* at ¶¶ 66-74. While providing for the appointment of an independent monitor to mediate disputes regarding compliance, *id.* at ¶ 66, the parties there acknowledge that the District Court itself retains ultimate authority to enforce all terms of the decree. *Id.* at ¶ 73(d). At the same time the decree prevents class members from enforcing its terms "based solely on isolated instances of non-compliance." *Id.* at ¶¶ 6, 73(e).

Finally, the decree acknowledges the pendency of this case before this Court. *Id.* at p. 4. It provides that the "final disposition of the issues raised by the *Artist M.* case will not be a basis for modification of [the] Decree." *Id.*

II. THE *B.H.* CONSENT DECREE SUPPORTS THE POSITION OF THE *ARTIST M.* PLAINTIFFS ON THE MERITS.

Defendant's principal contention in this case is that the reasonable efforts requirement contained in 42 U.S.C. § 671(a)(15) is so vague and amorphous that it is beyond the competence of federal courts to enforce. *See, e.g.*, Petition at 15. Defendant insists that the AACWA's reasonable efforts requirement can be enforced, if at all, only in the context of individual state court cases. *See, e.g.*, Brief at 27, 29-30, 41. Defendant's entry into the consent decree in *B.H.* completely undercuts this argument.

In the decree defendant unequivocally agrees that DCFS's obligation to make reasonable efforts to preserve

and reunite families *is* enforceable in federal court—namely, by the District Court with jurisdiction over *B.H.* Decree at ¶ 73(d). Moreover, the consent decree authorizes enforcement of its terms—including the reasonable efforts provisions in paragraphs 8 and 16(a)—*only* when they have been systematically violated. *Id.* at ¶ 6 ("[n]o class member is permitted to enforce this Decree based solely on isolated instances of non-compliance . . . with any . . . provisions in this Decree"); *id.* at ¶ 73(e) (same). Thus, *B.H.* fully supports the approach taken by the courts below in this case. As DCFS has agreed in *B.H.*, federal courts may competently remedy a State's systematic violation of its obligation to make reasonable efforts to preserve and reunite families.

Defendant's approval of the B.H. consent decree supports plaintiffs' position in this case in other ways. Under *B.H.* defendant has agreed that, regardless of the outcome of this case, DCFS can and will assign caseworkers far more quickly than contemplated by the preliminary injunction here. As noted above, *supra* at 3, to complete a social assessment in accordance with paragraph 7 of the decree, DCFS will be required to assign a follow-up caseworker to each child and family even *before* their cases ever appear in court. The preliminary injunction entered below, by contrast, requires the assignment of a caseworker within three days *after* the case is heard in Juvenile Court. Pet. App. at 56a. Moreover, in *B.H.* defendant has also agreed to establish strict caseload ceilings far beyond anything that might be required under the preliminary injunction. *Supra* at 3-4. Indeed, the District Court here rejected caseload ceilings as a remedy, requiring only that DCFS assign caseworkers who are capable of delivering child welfare services. Pet. App. at 55a n.3. Thus, given that DCFS has agreed to do far more in the consent decree, the preliminary injunction cannot be viewed as either unduly burdensome or unrealistic. On the contrary, the

injunction illustrates that federal courts are fully capable of crafting appropriate remedies for violations of the AACWA in light of a State's true institutional capabilities. *See* Plaintiffs' Brief at 27.

Finally, DCFS's adoption of a definition of "reasonable efforts" in the *B.H.* consent decree completely undermines its claim that the reasonable efforts requirement in § 671(a)(15) can have no objective meaning under any set of circumstances. Defendants' Brief at 30. The decree defines reasonable efforts to mean "such efforts to preserve the family as are consistent with good social work practice based on the individual circumstances of the case and the best interest of the child." Decree at ¶¶ 8, 16(a). As plaintiffs and amici curiae have argued, certain professional standards for social work can be applied objectively and systematically—namely, those which relate to caseworker assignment. *See* Plaintiffs' Brief at 26 n.9; Brief of American Association for Protecting Children, *et al.*, at 22-29; Brief of National Association of Counsel for Children, *et al.*, at 15 n.10. Plaintiffs acknowledge that the reasonable efforts requirement does not expressly adopt those standards. Nonetheless, by implicitly incorporating them into the definition of "reasonable efforts" in *B.H.*, defendant concedes that the reasonable efforts requirement can have an objective meaning. And in the context of DCFS's caseworker assignment system, it unquestionably does. *See* Plaintiffs' Brief at 25-27.

In short, the *B.H.* consent decree offers substantial support for plaintiffs' position on the merits. The consent decree confirms both the competence of federal courts to enforce plaintiffs' rights under § 671(a)(15) and the propriety of the remedy crafted by the District Court in this case.

III. THE *B.H.* CONSENT DECREE MAY AFFECT THIS COURT'S JURISDICTION OVER THIS CASE.

In order for this Court to retain jurisdiction, "[t]here must be a live case or controversy before [it]." *Kremens v. Bartley*, 431 U.S. 119, 129 (1977), *citing Sosna v. Iowa*, 419 U.S. 393, 402 (1975). The *B.H.* consent decree, however, has materially changed—if not eliminated—the controverted issues with respect to plaintiffs' claims here. *See Kremens*, 431 U.S. at 130.

First, in *B.H.*, DCFS has agreed to make reasonable efforts to prevent or eliminate the need for removing children from their families. Decree at ¶ 8. Although they are not members of the *B.H.* plaintiff class, children residing at home with their parents are thereby beneficiaries of the consent decree. Notwithstanding paragraph 3 of the consent decree, they may enforce this provision of the decree in the District Court, pursuant to Rule 71 of the Federal Rules of Civil Procedure. *B.H.* thus resolves both questions presented with respect to a sizable percentage of the class members in *Artist M.* Pet. at i. Children living at home have a right, enforceable in federal court, to reasonable efforts to keep them with their families.

Second, *B.H.* ultimately provides all of the relief which plaintiffs here sought regarding initial caseworker assignment, thereby raising additional mootness questions. Beginning July 1, 1993, DCFS must assign a caseworker to each of the plaintiffs prior to the commencement of their cases in Juvenile Court. *Supra* at 3. In addition, *B.H.* sets specific numerical limits on case assignment. *Supra* at 3-4. As a result *B.H.* goes well beyond the injunction's requirement that a caseworker be assigned no later than three days after a case is initiated in Juvenile Court. The consent decree also provides significant relief to children who would otherwise be without caseworkers at later stages of their cases. By eliminating the Interim Service Teams, the decree will significantly reduce the number of gaps in caseworker assignment,

supra at 3, which may further obviate the need for the preliminary injunction.

Third, the *res judicata* effects of the consent decree may also render much of this case moot. The *B.H.* plaintiff class includes all of the members of Class B in this case. *Compare* Decree at ¶ 1(e) *with* R. 10 at 1. Sue Suter, the Director of DCFS, is the defendant in each case.[4] The *B.H.* plaintiff class asserted rights and sought relief under the AACWA's reasonable efforts requirement in much the same manner as the plaintiffs here. *Compare supra* at 2 *with* J.A. 7-8, ¶¶ 7, 10 (allegations by Artist M., *et al.*, that DCFS had failed "to identify and deliver necessary services" for them and their families and had failed "to make reasonable efforts to prevent or eliminate the need for their removal from their homes [and] . . . to facilitate family reunification when removal has occurred"). The consent decree has resolved those claims between the parties, and its *res judicata* effects, 1B J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice* ¶ 0.409[5] (2nd. ed. 1991), may moot any continued litigation regarding § 671(a)(15) by the Class B plaintiffs here. *Cf. J. Aron & Co. v. Mississippi Shipping Co.*, 361 U.S. 115 (1959).

In combination, these factors raise significant questions about the Court's continued jurisdiction over this case. However, none of these questions has been addressed by the parties or by the courts below.

In *Johnson v. Board of Education of the City of Chicago*, 449 U.S. 915 (1980), *on remand*, 457 U.S. 52 (1982), this Court confronted a nearly identical situation. There, the defendant had entered into a consent decree in a related case which had significant bearing on the legal and factual issues being considered by this Court. 457 U.S.

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[4] Plaintiffs in *Artist M.* named Gary T. Morgan, DCFS's Guardianship Administrator, as a defendant as well. The District Court noted, however, that Morgan lacks a meaningful role as a party here. Pet. App. 33a n.1.

at 52-53. Because of the possibility that the consent decree had mooted the *Johnson* case, the Court vacated the Court of Appeals' judgment and remanded the case for further consideration in light of the consent decree. 449 U.S. at 915.

In *Kremens* this Court resolved a comparable case in a similar fashion. There, regulations and legislation adopted after the plaintiffs filed their complaint mooted the claims of the named plaintiffs and a large number of unnamed plaintiffs and drastically altered the claims of many of the remaining unnamed plaintiffs. 431 U.S. at 128-32. Because of their differing effects on various class members, the regulations and legislation left the plaintiff class "truncated and compartmentalized." *Id.* at 132. Consequently, before addressing any "live" claims, the Court remanded the case for reconsideration of the class definition and for consideration of the issue of mootness. *Id.* at 134-35.

Finally, in *American Foreign Service Association v. Garfinkel*, —— U.S. ——, 109 S. Ct. 1693 (1989), federal regulations adopted after the District Court's ruling, as well as a decision by the District Court in related cases, "place[d] th[e] case in a light far different from the one in which that court considered it." *Id.* at 1696. Those intervening regulations rendered moot the claims of certain plaintiffs. Their effect on other plaintiffs' claims remained an open question, requiring further factual development in the District Court. *Id.* at 1697. With part of the controversy moot and other parts possibly retaining vitality, the Court vacated the judgment below and remanded the case for further proceedings. *Id.*

The *B.H.* consent decree has had an analogous effect on this case. The claims of some of the plaintiffs have been mooted by *B.H.* Other plaintiffs' claims may survive. Likewise, the class definitions may require modification in light of the different effects *B.H.* will have on the various plaintiffs here. In short, "[t]he controversy as it exists

today is . . . quite different from the one that the District Court considered." *Garfinkel*, 109 S. Ct. at 1696. Consequently, as in *Johnson*, *Kremens* and *Garfinkel*, the District Court's consideration of recent developments may be appropriate in order to adjudicate this case in the most informed manner.

Finally, even if *B.H.* does not render this case moot, at the very least it has fundamentally altered the legal and factual landscape between the parties in this case. For that reason alone, it may be appropriate to remand the case for further consideration in light of these developments. *See Johnson*, 457 U.S. 52 (1982) (vacating judgment of Court of Appeals and remanding case with directions that it be consolidated with related District Court case to permit complete development of factual record). *See also Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986) (affirming remand to District Court for additional findings to permit Court to pass upon legal question presented to it).

CONCLUSION

In light of the entry of the consent decree in *B.H.*, plaintiffs respectfully request that this Court affirm the judgment of the United States Court of Appeals for the Seventh Circuit or, in the alternative, remand this case with directions to consider whether it is moot.

Respectfully submitted,

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